

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

| | | |
|-----------------------------------|---|------------------------|
| Aqua Illinois, Inc. |) | |
| |) | ICC Docket No. 09-0210 |
| |) | |
| |) | |
| Petition for Declaratory Judgment |) | |

STAFF REPLY BRIEF ON EXCEPTIONS

The Staff of the Illinois Commerce Commission ("the Staff"), by and through its counsel, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submits its Reply Brief on Exceptions in the above-captioned matter.

I. Procedural History

On April 17, 2009, Aqua Illinois, Inc. ("Aqua") filed a Petition for Declaratory Judgment ("Petition"), pursuant to Section 200.220 of the Illinois Commerce Commission's ("Commission") Rules of Practice, 83 Ill. Admin. Code 200.220. Aqua requests that the Commission issue a declaratory ruling as to the right of Aqua to terminate water service to the Sandra Oaks Complex in University Park, Illinois under Ill. Admin. Code 280.130(a)(1)(E) due to delinquent payment by some of its residents in violation of Aqua's Rules, Regulations, and Conditions of Water Service. Aqua Pet., at 1.

Aqua provides water and sewer service to University Park, Illinois. Aqua Pet., at 1. The Sandra Oaks Complex in University Park consists of 64 residential units, divided into four sub-complexes of 16 units each. Each sub-complex has its own main service

pipe for water and sewage, and the meters are located on the inside of each residential unit. Aqua Pet., at 2. Therefore, only an entire sub-complex can be turned off. Id.

Over the last 24 months, some residents of the Sandra Oaks Complex have been delinquent in payment on their service accounts. Aqua has posted notices of termination, and at least two residents filed informal complaints with the Commission contesting the authority of Aqua to disconnect all residents when only some are delinquent in their bills. Additionally, the Sandra Oaks Condominium Association filed an informal complaint with the Commission. Aqua Pet., at 3 and Ex. C.

Pursuant to proper legal notice, status hearings in this matter were held on May 20, 2009, June 9, 2009 and June 23, 2009 before a duly authorized ALJ of the Commission at its offices in Chicago, Illinois. Aqua filed its Initial Brief in support of its Petition on August 18, 2009. Staff filed a Reply Brief on September 8, 2009. At the request of the ALJ, the parties engaged in an oral argument on October 20, 2009. The ALJ issued a Proposed Order (“PO”) on December 8, 2009. The parties submitted Briefs on Exception (“BOE”) on December 28, 2009. This Reply Brief on Exception follows.

II. Argument

A. Jurisdiction Is Not At Issue

First, Aqua entirely misrepresents the ALJ’s PO by insisting that it concluded that “the Commission lacked *jurisdiction* to render a declaratory judgment as to the applicability of Aqua’s tariffs.” Aqua BOE, at 2, 3 and 4 (emphasis added). Not only are no such statements to be found anywhere in the PO, they are utterly wrong. In fact, the PO’s introductory language provides that “[f]or the reasons stated herein, we find that

we lack statutory *authority* to issue such a [declaratory] ruling.” PO, at 1 (emphasis added). Further, the PO clearly concludes that “the Commission *has* jurisdiction over the parties[.]” PO, Findings and Ordering Paragraph (2), at 10 (emphasis added).

Moreover, the PO accurately concludes that:

For the reasons stated herein, Section 5-150 of the Illinois Administrative Procedure Act does not *authorize* this Commission to entertain a declaratory ruling filed by a utility regarding the applicability of its tariffs to certain rate-paying customers.

PO, Findings and Ordering Paragraph (5), at 11 (emphasis added).

Aqua’s BOE also makes the same misrepresentation of Staff’s position. Aqua BOE, at 2. Staff never once argued that the Commission lacked *jurisdiction* to issue the sought for relief; but rather, clearly and repeatedly argued that the Commission had no *authority* under the AP and the Commission’s own rule to grant the relief Aqua requested. Tr., at 29, 51; Staff RB, at 6. The ALJ provided the parties in this matter an abundance of process wherein this issue was thoroughly discussed and briefed (including an oral argument in front of the ALJ), yet Aqua fails to cite to any such statements in the record to support such unfounded allegations.

The distinction between jurisdiction and authority is an important one. For example, jurisdictional issues can be raised at any time. *Strategic Energy, LLC v. Illinois Commerce Commission*, 369 Ill. App. 3d 238, 244-47 (2nd Dist., 2006). Also, on appeal the court would review jurisdictional issues de novo. *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 333-34 (2002); *Fredman Brothers Furniture Co. v. Ill. Dept. of Revenue*, 109 Ill. 2d 2002, 215 (1985). Aqua’s attempt to mischaracterize the issues in this proceeding should be ignored.

B. The Proposed Order Correctly Found that Tariffs Are Not Exactly The Same As Statutes

Aqua's argument that the ALJ erred in not finding that tariffs are the exact same thing as statutes misses its mark and in fact defies the law and logic. Aqua BOE, at 3-4. Aqua acknowledges that the PO found that "tariffs have the full force and effect of law." *Id.* Yet, that conclusion is not enough for Aqua. Aqua contends that tariffs "in fact are laws." Aqua BOE, at 4. Aqua, accordingly, seem to contend that tariffs are exactly the same as statutes. Aqua, however, fails to acknowledge the PO's next sentence, which accurately reasons that:

This does not mean, however, that tariffs are exactly the same as laws. If tariffs were exactly the same as laws in every respect, there would be no need to state that they have the full force and effect of law. And tariffs, unlike regulations or statutes, are drafted by the utilities.

PO, at 8.

In fact, Illinois courts have used the term contract and tariff interchangeably:

Under the [Public Utilities] Act [a utility's] schedule or tariff and its rules and regulations constitute part of its rate. Its rules and regulations are a part of that schedule or tariff. Its forms of *contract* need to be regular and uniform and as stated in the schedules. . . . its schedule or tariff, so filed is, in effect, a statement of the terms and conditions upon which it will and does render its service.

The company's official tariff on file, publicly, with the Illinois Commerce Commission, containing, inter alia, the foregoing provisions here material as a part of the terms and conditions upon which telephone service is rendered, is necessarily a component and integral part of its *contracts* and relationships with its subscribers, . . .

See e.g., *Ill. Bell Tel. Co. v. Miner*, 11 Ill. App.2d 44, 58 (2nd Dist. 1956)(emphasis added).

The court in the *Adams v. Nicor* case, which Aqua relies on, was concerned with undermining the filed rate doctrine by allowing a common law theory of negligence go

forward that necessarily allow a recovery that went beyond the utilities' limitation of liability tariff provisions. As that court concluded, "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Adams v. Nicor*, 211. 2d 32, 57 (2004). Although, the court found that "it cannot be doubted that Public Utilities Act supersedes the common law liability of the carrier *so far as rates and unreasonable discrimination are concerned.*" *Id.*, at 59 (emphasis in original). It ultimately concluded that:

Illinois courts have recognized that where a utility tariff speaks to a specific duty, the tariff may be controlling; however, where the tariff does not address a particular situation, the common law applies and a common law duty analysis must be applied.

Id., at 60-61.

Thus, where Illinois courts have allowed common law negligence that goes beyond the limitation of liability contained in a utilities' tariff, when it does not address a specific issue, the ALJ's comparison of tariffs to other legal instruments specifically identified under Code of Civil Procedure is hardly precluded. PO, at 8 ("mentioned in the Illinois Code of Civil Procedure, which allows a judgment declaring the rights of any as they are provided for in 'any deed, will, contract or other written instrument,' . . . not drafted by public bodies like administrative agencies or the General Assembly."). Thus, tariffs are not entirely the same as statutes.

C. Aqua Does Not Seek A Determination Of Its Rights

Aqua also contends that the PO is wrong in when it found:

Aqua really is not seeking a determination of its rights. There really is no question here that the provisions that are at issue, which are in Aqua's tariffs, apply to Aqua. What Aqua seeks here is very much like the circuit court cases cited previously, which were filed by insurance companies,

seeking construction of instruments (insurance policies) that they prepared, but which, sought judicial determinations regarding the rights of other persons or entities (the insured persons or entities).

PO, at 9.

This, of course, is exactly what the Administrative Procedure Act (“APA”) (5 ILCS 100/5-150(a)) and the Commission’s rule (83 Ill Admin. Code, Part 200.220) precludes. Aqua has known its rights from the inception of this docket, after all the tariffs in question are its own tariffs – it drafted them. Aqua’s filed documents in this case demonstrate this over and over. Aqua Pet., at 2; Aqua IB, at 3. Moreover, Aqua has not questioned its rights. Ironically, even the introductory section of their BOE conclusively demonstrates that it was not seeking a determination of its rights. For example, Aqua states:

Aqua has been patient in seeking a solution of disconnecting the entire Sandra Oaks complex. Aqua has held off disconnection procedures while the informal complaints have been pending.

Aqua BOE, at 1-2.

Likewise, Aqua again demonstrates that it suffers under no cloud of confusion of its rights when it states:

Aqua, however, can no longer wait to act. . . . Aqua intends to begin the necessary procedures to proceed with disconnecting Sandra Oaks for failure to pay and failure to allow access pursuant to Aqua’s tariff.

Aqua BOE, at 3.

Obviously, Aqua knows and understands its rights as a utility regulated under this Commission, and as noted above it repeatedly says so. Sandra Oaks did not file a Petition for a Declaratory Ruling; Aqua did. Consequently, the PO was entirely right when it concluded that:

The Administrative Procedure Act provides that a declaratory action may be filed in an administrative agency when it concerns “*the applicability to the person presenting the petition or request of any statutory provision enforced by the agency or of any rule of the agency.*” 5 ILCS 100/5-150(a); *emphasis added*. The Administrative Procedure Act does not permit this agency to entertain declaratory actions filed by one person or entity, but which ask this Commission to determine the rights of persons or entities other than the petitioner.

PO, at 9.

The PO continues in fully and accurately articulating the parameters of the APA as pertains to this proceeding:

Thus, we are not permitted to entertain actions that, really determine the rights of persons or entities who are not the petitioner. Here, while Aqua might have a *right* to turn off service to Sandra Oaks residents in certain circumstances, that right, defined by tariffs, is not in dispute. What *is* in dispute here is whether Aqua can legally terminate service to paying residents of Sandra Oaks who are served by the same service pipe as non-paying units. Thus, the issue here is not Aqua’s rights, but, it is those of the residents of Sandra Oaks. The Administrative Procedure Act does not permit such an action.

PO, at 9.

As the PO understood, the only possible rights that Aqua could be seeking a determination of are Sandra Oaks, not Aqua’s. Such determinations of rights are specifically precluded under the APA (5 ILCS 100/5-150(a)) and the Commission’s rule (83 Ill Admin. Code Part 200.220.) The PO’s conclusion in this regard is supported by both the facts in this proceeding, the APA, the Commission’s rules and long-established caselaw.

III. Conclusion

WHEREFORE, for the reasons set forth above, the Staff of the Illinois Commerce Commission respectfully recommends that the Commission adopt the PO as written, other than the few apparent scriveners' errors Staff has identified.

Respectfully submitted,

/s/ _____
MICHAEL J. LANNON
JESSICA L. CARDONI

Office of General Counsel
Illinois Commerce Commission

January 11, 2010

Michael J. Lannon
Jessica L. Cardoni
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Suite C-800
Chicago, Illinois 60601
(312) 814-4368
mlannon@icc.illinois.gov
jcardoni@icc.illinois.gov